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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 184.

H. HACKFELD & CO., LIMITED,
Petitioner,

against

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

MAXWELL EVARTS,
Of Counsel for the Petitioner.

C. G. Burgoyne, Walker and Centre Streets, New York.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 164.

H. HACKFELD & Co., Limited,
Petitioner,

AGAINST

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

Statement.

On October 28, 1902, the steamship "Korea," belonging to the Pacific Mail Steamship Company, brought two Japanese persons from Yokohama, into the port of San Francisco, California. They were denied admission into the United States and were ordered deported, and on November 7, 1902, they were placed on board the "Korea" for the purpose of deportation to Japan.

On November 12, 1902, the "Korea" on her way to Japan, stopped at the port of Honolulu in the district and territory of Hawaii. When the "Korea" arrived at Honolulu, the two Japanese were still on board the vessel, and were placed with certain Chinese (also ordered to be deported) in a room on the vessel, and locked up by the steerage steward. At about 12 o'clock, midnight, the Japanese were still locked in the room of said vessel. Between that time and 5 o'clock in the morning of November 13, 1902, the Japanese effected their escape through portholes in the room which were nearly 25 feet above the water (Record, p. 15). Apparently none of the Chinese locked in the room with the Japanese escaped.

An information was filed by the United States Attorney for the District of Hawaii against H. Hackfeld & Co., Limited, the agent of the steamship "Korea," upon the ground that said Hackfeld & Co., Limited, neglected to detain and refused and neglected to return to the port of Yokohama, in the Empire of Japan, the two Japanese immigrants, in violation of Section 10 of the Act of Congress, entitled "An Act in amendment of the various acts relative to immi-

grants and the importation of aliens under contract or agreement to perform labor," approved March 3, 1901 (Record, p. 2).

To this information the defendant H. Hackfeld & Co., Limited, pleaded not guilty (Record, p. 12). A stipulation waiving a jury was signed by the attorney for the United States and the attorneys for the defendant, and the case was tried by the Court upon an agreed stipulation of facts, by which it was stipulated that the method of escape of the two Japanese immigrants "could not have been reasonably anticipated by the master or officers or agents of said steamship 'Korea' * * * and that said escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or said defendant" (Record, p. 15).

The case was tried and the defendant was found by the Court to have refused and neglected to return to the port from whence they came the two Japanese immigrants, and to be guilty as charged in the information, and a fine was imposed of six hundred dollars (Record, p. 17).

The judgment imposing the fine was brought by writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, which

affirmed the judgment below upon the theory that the trial court was not bound by the stipulation between the parties that the "escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or said defendant," and that it was at liberty to find that the defendant by placing the men in the room as it did, without taking precaution against their escape through the portholes, neglected to perform the obligation imposed upon it by the statutes, and that, if such was the view of the trial court, the Circuit Court of Appeals could find no ground to question the correctness of such conclusion (Record, p. 27).

The case was then brought to this Court by writ of *certiorari*, and the only questions presented by the record would seem to be these:

(1) Is a court which tries a case upon a stipulation of facts agreed upon in writing by the parties, bound to find the ultimate facts in the case as they have been stipulated?

(2) Can a defendant be convicted under the Act of Congress in question, if the escape of the returned immigrant was not due to negligence on his part?

FIRST POINT.

The trial court was bound by the stipulation of the parties.

In the stipulation which was signed by the attorney for the Government, by the defendant's attorneys, and by the defendant itself, it is expressly stipulated that the escape of the two Japanese "did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or said defendant." This was a stipulation as to the ultimate fact in the case. The whole question before the Court was, whether the defendant could be convicted under the Immigration Act, when the escape of the deported foreigners took place without any negligence on its part. The parties agreed that there was no negligence in the particular proceeding before the Court, and asked the Court to determine whether, as a matter of law, in such a case, where there was no negligence, the defendant could be convicted.

The view which the Court below took of the action of the trial court was that the latter was entitled to and did find that the defendant was negligent, notwithstanding the stipulation between the parties that it was not negligent, and

that, therefore, the judgment of the trial court should be sustained without requiring any discussion of the doctrine in the case of Warren vs. United States, 58 Fed. Rep., 559, which case, the appellant has always claimed, placed a construction upon the act which should not be followed. That is to say, the Court below avoided the discussion of the application of the Warren case to this controversy upon the ground that the facts were such that it had no bearing thereon.

The mere statement of the proposition that a Court cannot find an ultimate fact in the case contrary to the stipulation of the parties as to what such ultimate fact is, would seem enough. Where a jury is waived, and the case is tried upon a stipulation of facts agreed upon by the parties, it would seem that the ultimate facts so agreed on must necessarily be taken by the Court as the true facts of the case, without regard to what conclusion the Court might think it would itself have come to from the evidential facts, or else that the stipulation must be entirely disregarded and the case tried in the usual way by oral testimony. The Court must either try the case on the stipulation agreed upon or not at all. It cannot frame a stipulation for itself.

The stipulation of facts in this case contained the ultimate fact that the defendant was not negligent in regard to the escape of the Japanese. It thus met the requirements of this Court, which has held that a statement of facts by the parties must state the ultimate facts of the case. This was held in Raimond vs. Terrebonne Parish, 132 U. S., 192, 194, where it was said:

> "By the settled construction of the acts of Congress defining the appellate jurisdiction of this Court, either a statement of facts by the parties or a finding of facts by the Circuit Court is strictly analagous to a special verdict, and must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances which may tend to prove the ultimate facts, or from which they may be inferred."

In Wilson vs. Merchants Loan and Trust Company, 183 U. S., 121, 128, it was said:

> "Although there is a general finding in favor of the defendant, yet there is a statement of facts which contains certain ultimate facts together with certain other facts evidential in their nature from which an

> important and ultimate fact might be inferred, but in regard to which there is no agreement or finding whatever. In such case it would not be proper to regard the agreed statement as a sufficient finding of ultimate facts within the statute."

If the trial court is not bound by the stipulation of facts as submitted by the parties it would seem as if the field open to a Court trying a case in which a jury has been waived and the facts stipulated is even greater than that of a jury. The stipulation is the evidence in the case. If a Court can find the facts contrary to the express stipulation, then it is equivalent to the Court finding the facts contrary to the evidence or without any evidence.

There can be no dispute as to what the stipulation was upon the question of the negligence of the defendant. It is stated in so many words that the escape of the Japanese did not occur by reason of any negligence or lack of proper care on the part of the defendant. That is the ultimate fact to be gathered from the other evidential facts in the case. If the stipulation had not contained this ultimate fact, but had stopped short thereof, giving only the evidential facts,

of course it would have been open to the Court to find such ultimate facts from the stipulation as it chose, either that the defendant had been or had not been guilty of negligence, and the defendant would of course have been bound by such finding. But the ultimate fact of an absence of negligence having been stipulated by the parties, that would seem to be an end of the matter and to leave the Court without power to make any finding to the contrary.

The relation of the trial court to a stipulation of facts is not unlike the attitude of an appellate court in reference to the findings of the Court below. If the lower court finds the ultimate facts in the case, then the appellate court is necessarily bound by such finding and cannot overcome it, by claiming that the evidential facts show such finding to be wrong.

The case of Dooley vs. Pease, 88 Fed. Rep., 446 (affirmed in 180 U. S., 126), was an action of trespass brought by the plaintiff as Receiver of a National Bank against the defendant the Sheriff of Cook County, Illinois, charging him with having forcibly seized and carried away a stock of goods. The question in dispute in the case was as to the ownership of the goods at the

time of the seizure. The goods had formerly belonged to the attachment defendant, prior to and on April 25, 1895, and the question was whether the instrument of sale that day executed in the name of the attachment defendant by its president was valid and effective to transfer title to the plaintiff as Receiver. The validity of the instrument was denied upon the ground that the president of the company was without authority to make the sale. It was insisted that the facts contained in the special finding of the Judge which were evidential only of the ultimate facts found required a contrary conclusion. The Circuit Court of Appeals for the Seventh Circuit declined to pass upon the question of whether the finding of the Court was according to the preponderance of evidence, and pointed out that it was bound by the findings of the lower court on any ultimate fact, without regard to whether it thought such findings could be sustained by the evidential facts. The Court said at page 448 as follows:

> "But, if a party sees fit to waive a jury in a case involving a question of that kind [mixed question of law and fact], he puts it beyond his power to challenge the Court's

finding, unless he may chance to be able to do so upon an exception to a ruling during the progress of the trial. *For instance if the issue be negligence, which rarely is resolved into a pure question of law, a special finding of the ultimate fact either way cannot be overthrown by force of merely evidentiary facts stated in the finding, however strong;* and so, here, the finding that the sale was unauthorized, and had not been ratified, cannot be impeached on the strength of the circumstances stated tending to show the contrary. The sale, made as it was without authority, did not pass title, and the goods were therefore subject to seizure by virtue of the writs of attachment."

In Supervisors vs. Kennicott, 103 U. S., 554, a jury was waived and the case tried upon an agreed statement of facts. This Court in speaking of the duty of the Court below, said at page 556:

"This record shows distinctly that the court was only *required to determine whether in law, on the agreed facts*, the defendants were liable on their bond. It is true that in the judgment as entered it is stated that the court found the issue in favor of the

> plaintiffs, but that, when read in connection with the bill of exceptions, is no more than a declaration that the court found *the law to be in favor of the plaintiff on the case as stated.*"

The Kennicott case would seem to be a square authority to the effect that the trial court in this case could only determine whether, under the Immigration Act, the defendant could be convicted for neglecting to detain the Japanese immigrants on board the "Korea" when it had been guilty of no negligence with reference to their escape. That is to say, the Court below was obliged to take the facts as they had been agreed on, especially the ultimate fact of negligence, and simply find what the law was as applicable to such facts, and that it was not open to the Court to find from the evidential facts the ultimate fact that the defendant was negligent, notwithstanding the stipulation that it was not. In other words, the sole question properly before the trial court under the stipulation of facts was whether a defendant can be convicted under Section 10 of the Immigration Act for an escape of deported foreigners which occurred without negligence or want of care on its part,

and such question was all that the Court below was required to or could determine.

SECOND POINT.

The conviction of the appellant for neglecting to detain on board the "Korea" at Honolulu the two Japanese cannot be sustained in the absence of any negligence on its part.

The section of the Immigration Act, which is to be construed, is of a highly penal character, and is as follows:

> Sec. 10. That all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessel on which such aliens came; and if any master, agent, consignee or owner of such vessel shall refuse to receive back on board the vessel such aliens, *or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port from which they came*, or to pay the cost of their

> maintenance while on land, such master, agent, consignee or owner shall be deemed guilty of a misdemeanor, and shall be punished by a fine not less than three hundred dollars for each and every offense; and any such vessel shall not have clearance from any port of the United States while any such fine is unpaid [26 U. S. Stat., 1084, 1086].

It was long ago established as the law that penal statutes should be construed strictly. It is unnecessary to cite authority in support of this proposition, but in U. S. vs. Wiltberger, 5 Wheat., 95, it was said by Chief Justice MARSHALL:

> "The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment."

The offense charged in this case was the neglecting to detain the Japanese on the vessel, and neglecting to return them to the country from

whence they came. The whole controversy seems to come to this one question: What is meant by the word "neglect" as used in the statute? Can a man neglect to do a thing without being careless and negligent?

It is conceded that Hackfeld & Co. were not guilty of any negligence in the fact that they did not detain the Japanese in the ship and did not return them to Japan. It is so stipulated. If they were not guilty of negligence in such regard, it is not plain how they can be said to have neglected to do so.

The verb "neglect" certainly carries with it the idea of negligence. If a man neglects to do a particular thing, he does not take the necessary care to see that the particular thing is done. He is careless and negligent. If Congress had intended that the carrier was to be regarded as an insurer of the return of an immigrant ordered deported it would hardly have chosen the word "neglect," and would have used some word such as "fail" or "omit" in place thereof. The words "neglect," "fail" and "omit" are by no means synonymous. The word "neglect" means to fail to do a thing by reason of want of care and negligence. If a man is to be punished for failing or omitting

to do some act, it is enough to show that he has not done it; but if he is to be punished for neglecting to do it, there must be shown in addition to the fact that he failed or omitted to do it, that such failure or omission was the result of negligence and want of care on his part. That is to say, the word "neglect" means something more than the words "omit" or "fail," and contains the further element of negligence and want of care as the reason of the failure and omission. The definition of the verb "neglect" in the Standard Dictionary of 1904 is "to fail to perform through carelessness."

Therefore a strict construction of this highly penal statute would seem to require that, before a person could be convicted thereunder for not detaining on a ship immigrants ordered to be deported, and for not returning them to the country from whence they came, the immigrants must be shown not only not to have been detained and not to have been returned, but that such failure and omission to detain and return them was the result of negligence and want of care on the part of the defendant.

So far as known the only case construing the 10th Section of the Immigration Act is Warren

vs. United States, 58 Fed. Rep., 559. This case was decided adversely to the contention of the petitioner in the case at bar. The question in the Warren case was whether the ruling of the trial court which excluded evidence tending to show that the escape of the immigrants was not due to the negligence of the defendant, was right. It was held by the Circuit Court of Appeals for the First Circuit that the ruling was right, apparently on the theory that the carrier was obliged to return either dead or alive immigrants ordered deported and the Court classed such immigrants with "unwholesome or diseased provisions" and with "dangerous explosives."

Inanimate objects and human beings can hardly be classed together. A person might properly be held as an insurer in one case and not in the other. The carrier is obliged to have some regard for the fact that the immigrants ordered returned are human beings, and must treat them accordingly. He cannot box them up in crates or put them in chains in the lower hold of the vessel. It was never the intention of Congress that they should be so treated, nor did it ever occur to anybody that a Court would so construe the statute as to practically compel the carrier

to take some such course. It would seem as if, in the Warren case, it was the Court in Massachusetts, which compared human beings with "diseased provisions" and "dangerous explosives," and not the carrier which was without soul.

In other words the carrier is obliged to treat deported immigrants in a proper way, having regard to the fact that they are still human beings, even if not permitted to live in this country, and if every reasonable precaution and care is taken to prevent their escape, then it is difficult to see how the carrier can be held criminally liable when such escape is not due to its negligence and want of care.

The Japanese, who escaped, did something which the other immigrants deported with them did not dare to do and which had never been done before and which nobody would naturally anticipate. The escape did not occur through any negligence on the part of the defendant (Record, p. 15).

Now, either the carrier must crate deported immigrants or chain them and deliver them in the country from whence they came either dead or alive, or it must be held responsible

for escapes only when occurring through negligence and want of care on its part, the question of negligence to be determined with due consideration for the fact that human beings are entrusted to its custody.

Under the ruling of the Warren case the carrier would have been held liable if the Japanese had jumped overboard in midocean and drowned because the carrier failed and omitted to detain them on the vessel and return them to the country from which they came. Such construction of the statute would hardly seem reasonable in such a case, but there is absolutely no difference in principle between the case suggested and the present case.

The Warren case was strongly criticised in United States vs. Spruth, 71 Fed. Rep., 678, where Judge BUTLER declined to follow it as to another portion of the Immigration Act, and then said, at page 680, as to the 10th Section of the act:

> "It is not improbable that it will be followed with reluctance, even as respects the tenth section. The wisdom of such a construction of language in a criminal statute may be doubted."

It is, therefore, respectfully submitted that a conviction for neglecting to detain on board a vessel deported immigrants cannot be sustained when the escape of the immigrants was not due to any negligence on the part of the defendant.

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